



## Kentucky Law Journal

Volume 22 | Issue 4

Article 1

1934

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### Recommended Citation

Evans, Alvin E. (1934) "Testamentary Revocation by Subsequent Instrument," *Kentucky Law Journal*: Vol. 22 : Iss. 4 , Article 1.  
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# KENTUCKY LAW JOURNAL

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Volume XXII

May, 1934

Number 4

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## TESTAMENTARY REVOCATION BY SUBSEQUENT INSTRUMENT

By ALVIN E. EVANS\*

Wills may be revoked by act to the document, by operation of law and by subsequent instrument. This discussion is confined to the latter method. It does not deal with such closely related matters as revival, revocation occasioned or prevented by fraud, nor as far as may be avoided, with dependent relative revocation. These latter matters are not peculiar to revocation by subsequent instrument and they deserve and have largely received adequate treatment elsewhere.

The subsequent revocation may, of course, be by will or by codicil and in most states by a "writing declaring the same" executed in the manner required for the execution of a will. The will or codicil may contain an express revoking clause, or it may be inconsistent totally or partially. No question here arises, however, as to the possibility of partial revocation, since the question whether it is possible or not becomes a problem only when the attempt is made by an act to the document.

The two outstanding factors are: (a) inconsistency generally of the later writing with the earlier will, and (b) inconsistency coupled with the fact that the provisions of the later inconsistent instrument cannot operate, due to some statute or legal rule. More incidental are such inquiries as these matters (c) the revocatory effect of such expressions as "this is my last will"; (d) whether an invalidly executed will may be revocatory; (e) whether a subsequent will inconsistent in its dis-

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positions with the earlier one revokes by silence the appointment of executors without naming others; and (f) whether a non-dispositive revocatory writing should be probated.

*This is My Last Will.* This expression once was believed to be significant of an intention to revoke, inasmuch as according to Swinburne, one can leave only one last will or testament. But a rule has developed involving a process of integration whereby it has been decided that a will, generically, may consist of several specific wills so far as they are consistent, that just as a will need not consist of a single sheet nor be prepared at a single sitting, so it need not, as a whole, be comprehended within a single act of final execution. No effect at all is given to the expression in some states and it is regarded as simply a generic expression and equals "this is my will" and so is not to be treated as a revocatory clause in any sense. Sometimes it is regarded as one of many elements to be considered in determining whether the earlier will is revoked. On the whole, it seems to have of itself no revocatory effect whatever.<sup>1</sup>

*The Revocatory Clause.* A revocatory clause will revoke a former will whether or not it is contained within a will which completely disposes of the testator's property.<sup>2</sup> Such effect may not be intended as, for example, it may have been inserted by the draftsman, who was ignorant of its effect, the instrument being intended only as a codicil, but if its presence were known to the testator it will not be disregarded. In *Collins v. Ellstone*,<sup>3</sup> the testator had protested that he did not desire to revoke his former will but was persuaded to allow the revocatory clause to stand because, as explained to him, it was purely formal and had

<sup>1</sup> *Plenty v. West*, 9 Jur. 458 (1845)—"This is my last will" revokes former wills. *Lemage v. Goodban*, L. R. 1 P. & D. 57 (1855) (No effect given to similar words); *Leslie v. Leslie*, 6 Ir. Eq. 332 (1872) (These words have no weight whatever); *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705 (1903), 87 Neb. 455, 127 N. W. 904 (See 89 N. W. 451) (No weight). *Venable's Will*, 127 N. C. 344, 37 S. E. 465 (1900) (no weight). In *Simpson v. Foxon* (1907), P. 54, a will containing the words, "This is my last and only will" did not revoke a prior will, since it did not make a full disposition of the property. The term is a mere generic phrase. The common usage the world over is to employ the words "will," "testament" and "last will and testament" as exactly synonymous, *Hill v. Hill*, 7 Wash. 409, 35 Pac. 360 (1893). See also *Gordon v. Whitlock*, 92 Va. 723, 24 S. E. 342 (1896), "my will is as follows"—not revocatory; *Fry v. Fry*, 125 Ia. 424, 101 N. W. 144 (1904); *Freeman v. Freeman*, 5 De G. M. & G. 704 (Ch. 1854).

<sup>2</sup> *Pierpont v. Patrick*, 53 N. Y. 591 (1873).

<sup>3</sup> (1893) P. 1.

no effect. If, however, its presence had not been called to the testator's attention it might have been omitted from probate.<sup>4</sup> Our own courts have, in some cases, been more successful in cases of the *Collins v. Ellstone* type. Thus, in *Rickard v. Rickard*<sup>5</sup> the testator had devised certain premises to A for life and made his wife the residuary beneficiary. Later, by codicil, he declared, "This will have no effect," assigning certain conduct of A as the ground for the revocation. It was held that it was a question for the jury whether the testator intended to revoke the entire will. So, in *Owens v. Fahnestock*,<sup>6</sup> a testator executed a will, numbering in it nine items. Having forgotten to name an attorney, he prepared a holograph and, after reciting that he revoked all former wills, he named an attorney as item ten. The court held that there was no intention to revoke the former items—one to nine. It seems unnecessary to urge, in support of the result, that the second instrument was, in effect, a codicil and though it may *not republish* the will, it may be integrated with the will, so that the two are one will with the revocatory clause coming in a rather unusual place in the will and creating at most a latent ambiguity. The same principle might well have been applied to *Collins v. Ellstone*, that a will in form, is to be regarded as a codicil if it is a mere appendage, addition to or alteration of a prior will. That is to say, a general revocatory clause in a codicil may well be regarded as revoking all other wills save the will of which it is a part. There is no occasion to denominate a paper a codicil if it entirely revokes the very instrument it supplements. The context will generally indicate whether the paper is a will or a codicil, whatever name is attached to it. So in this case the later instrument, being clearly supplementary and intended as a codicil, might well have been construed as a codicil and so revocatory of all instruments prior to the will it supplements. Indeed, it is easier to avoid the revocation here than in *Denny v. Barton*,<sup>7</sup> where the revocatory

<sup>4</sup> *Goods of Oswald*, L. R. 3 P. & D. 162 (1874). *Goods of Moore*, 1892 P. 378. *Goods of Wray*, Ir. R. 10 Eq. 266 (1876). Cf. *Hippesley v. Homer*, T. & R. 48 Note (Ch. 1804).

<sup>5</sup> 134 Va. 485, 115 S. E. 369 (1922).

<sup>6</sup> 110 S. C. 130, 96 S. E. 557 (1918), cf. 32 Harv. L. Rev. 183 (1919). The dicta in *Smith v. McChesney*, 15 N. J. Eq. 359 (1862) and *Van Wert v. Benedict*, 1 Bradf. 114 (Sur. N. Y. 1850) are without value.

<sup>7</sup> 2 Phill. 575 (Ecc. 1818). See also *Gladstone v. Tempest*, 2 Curt. 650 (Ecc. 1840) (drafts drawn in favor of servants on testator's banker and delivered to the beneficiaries not to be presented during testator's

clause was held inapplicable to a letter which, in fact, was testamentary but which testator did not consider so.<sup>8</sup> The well established rule is that a mistake in or a misunderstanding of the effect of language intentionally used does not afford occasion for a court to give an unusual construction to plain language.<sup>9</sup>

The question, what forms a mere revocation should assume, frequently arises.<sup>10</sup> The English courts have given effect to the apparent intent of the testator. So such declarations as "Mr. George is in possession of my will. I am unable to destroy it myself, but I desire that he destroy it" have been regarded as sufficient to revoke, and the actual destruction of it by the person so directed would have no significance, as the revocation is by writing and not by act to the document.<sup>11</sup> Some American

life and intended to operate independently of the executors, held to be testamentary but not revoked by a general revoking clause). In *Goods of Howard*, L. R. 1 P. & D. 636 (1869), a codicil revoking the bequests in the will and naming three persons as executors did not revoke the appointment of executors in the will, which also devised realty.

<sup>8</sup> See *Robinson v. Clarke*, L. R. 2 P. D. 269 (1877) (Though second will contained a revocatory clause, the prior one was probated with it by consent of the parties); *Powell v. Mouchett*, 6 Madd. 216 (V. C. 1821) (An issue was directed whether the revocatory clause was a part of the will.)

<sup>9</sup> *Barker v. Com.*, 110 Mass. 477 (1872); *Iddings v. Iddings*, 7 S. & R. 111 (Pa. 1821). (Will directed the executor not to cancel the accounts with testator's children. He meant the exact reverse but did not comprehend the meaning of "to cancel".)

<sup>10</sup> In *Cranvel v. Sanders*, Cro. Jac. 497 (K. B. 1618), it is said that if testator say that "my will shall not stand or I intend to revoke my will," this is no revocation, but if he say, "I do revoke my will" this is a revocation. A power of attorney to deal with property already devised is not a revocation, though the instrument may be sufficiently executed as a will and though, if executed, there would be nothing on which the will could operate, *In re Kilborn*, 5 Cal. App. 161, 89 P. 985 (1907).

<sup>11</sup> *Walcott v. Ochterlony*, 1 Curt. 580 (Ecc. 1837). See also *In re Durance*, L. R. 2 P. & D. 406 (1872) (a signed, attested and subscribed letter to testator's brother, "to get the will and burn it"); *Toomer v. Sobinska* (1907) P. 106 ("I hereby declare that my will which is not in my possession and which I am unable to destroy is null and void and I intend to express my wishes in a will to be executed shortly.") *Goods of Hicks*, L. R. 1 P. & D. 683 (1869) (This my last will is hereby cancelled and I have made no other); *Re Fraser*, L. R. 2 P. & D. 183 (1870) (This will is cancelled this day); *Goods of Eyre* (1905) 2 I. R. 540 (Letter directed daughter to destroy testator's will). *Goods of Hubbard*, L. R. 1 P. & D. 53 (1865) (Testatrix executed a codicil revoking all other codicils and appointed an executor under her will. She had executed a deed but no will. Court held it could not grant probate of a testamentary paper unless it took effect upon something. Administration was granted to the next of kin with codicil annexed). In England now administration is granted with a note referring to the writing of revocation but without annexing the revocation to the

courts are more strict, and several courts have held that similar expressions were not sufficient, because the testator intended to revoke by destructive act rather than by written instrument. Thus, the following signed, attested and subscribed letter was insufficient: "Dr. Kennedy: Please destroy the will I made in favor of Thomas Hart."<sup>12</sup> A less strict view permits the following words to amount to a revocation when properly executed: "My former will (identified) has been lost, destroyed or stolen and said will is void as a new one has been made."<sup>13</sup>

*Revocation by Later Instrument Not Duly Executed as a Will.* The other writing not a will, in order to revoke must, under statutes following the Wills Act, be executed in the same manner as wills are executed. Perhaps in two states which follow the Statute of Frauds, such writing, if signed, need not be

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grant. See 16 Halsbury's Laws, "Executors and Administrators," 195. A soldier's will may be revoked by his own unattested letter. *Estate of Gossage* (1921), P. 194 (Letter to sister to get will and burn it, as testator had canceled it). But a mere accidental destruction cannot be ratified so as to become a revocation. *In re Booth* (1926), P. 118.

<sup>12</sup>*In re McGill's Will*, 229 N. Y. 405, 128 N. E. 194 (1920). See 33 Harv. L. Rev. 566 (1920); ib. 620. But in *Backhus' Will*, 63 N. Y. S. 544 (App. D. 1900), it was held that the expression found in a trust deed, "I hereby revoke, cancel and annul any last will heretofore made by me," was a revocation. In *Tynan v. Paschal*, 27 Tex. 286 (1863), a letter by testator to his attorney in fact to destroy testator's will was held not to be a revocation, stress being laid upon the intended manner of revocation. It is not clear what would have been the holding in the following two jurisdictions if the allegedly revoking instrument had been properly executed. *Newboles v. Newboles*, 169 Ark. 282, 273 S. W. 1026 (1925): "This is to certify that I have this day decided not to will my land to my son James." The insufficiency consisted in a witness signing his name as a notary public and having made a cross for the signature of the testator without explanation; *Harris v. McDonald*, 152 Ga. 18, 108 S. E. 448 (1921) (Testator wrote to the Ordinary to cancel the record of her will if recorded and to turn it over to Mr. Neale and "Mr. Neale will please destroy the will as it is worthless and not according to my desire. This letter is to be preserved as authority." Only two witnesses attested and subscribed it).

<sup>13</sup>*Luther v. Luther*, 211 Ala. 352, 100 So. 497 (1924). See also *Bayley v. Bailey*, 5 Cush. 245 (Mass. 1849) (A properly executed instrument read: "It is my wish that my will be destroyed and my estate settled according to law"). Where erasures and interlineations are made and there is a full re-execution of the instrument, the revocation is effective *pro tanto*, the same as if an entirely new will had been prepared, *Goods of Gosling*, 11 P. D. 79 (1886). See also *Kohn's Estate*, 172 Mich. 342, 137 N. W. 735 (1912) (Testator re-executed by drawing dry pen through his name and having other attestors subscribe, thereby validating interlineations and obliterations).

attested and subscribed.<sup>14</sup> In an early and important case, *Onions v. Tyner*,<sup>15</sup> it was held that the revoking clause would not operate apart from the will, which was insufficiently executed to dispose of property. This seems to be a desirable and sound result. It certainly was not intended to operate independently of the will.

It may safely be proposed now, save as above qualified, that neither inconsistency nor the revocatory clause in an insufficiently executed will has any effect.<sup>16</sup> In states where an executor is a disqualified attester it has likewise been held that the revocatory clause fails as, for example, where the wife of the executor became an attester.<sup>17</sup>

#### REVOCATION BY INCONSISTENT VALID INSTRUMENT

A will may be revoked by a subsequent writing which expressly revokes, or by one which is inconsistent. If the earlier paper gives a specific bequest to A and the later one gives the same bequest to B, there is an inconsistency. If the later also gives the same specific bequest to A, there is no inconsistency, but the gift will pass by the later will, thus rendering the earlier provision inoperative.<sup>18</sup> So if the earlier will gives a general legacy to A and the later will also gives to A the same sum, there again is no inconsistency. The first becomes inoperative if there is no cumulation, but is operative if there is a cumulation. The same is true where the later will merely makes a gift of a different sum to the same legatee to the degree that the two gifts are coextensive if there is no cumulation. In case the later gift is

<sup>14</sup> Florida and Maryland. See Bordwell Statute Law of Wills, 14 Ia. L. Rev. 235-7 (1929).

<sup>15</sup> 2 Vern. 742 (Ch. 1717). *Roper v. Ratcliffe*, 5 Bro. P. C. 360, 2 Rep. 731, 8 Vin. Abr. 141, Devise R. (H. of L. 1714) and dictum in *Gardner v. McNeal*, 117 Md. 27, 82 A. 98 (1911). But see *Rolle Abr. Devise P. 72*. At one time in North Carolina a revocation of a devise could be accomplished by an unsigned and unattested writing. See *Clark v. Eborn*, 6 N. C. 235 (1813).

<sup>16</sup> *Jenner v. Finch*, 5 P. D. 106 (1879); *Harris v. McDonald*, 152 Ga. 18, 108 S. E. 448 (1921); *Voorhis' Will*, 7 N. Y. S. 596 (Sup. Ct. 1889); *Leard v. Askew*, 28 Okla. 300, 114 P. 251 (1911); *Reese v. Probate Court*, 9 R. I. 434 (1870). See also *Appeal of O'Brien*, 120 Me. 434, 115 A. 169 (1921) and *Golsticker's Will*, 192 N. Y. 35, 84 N. E. 581 (1908) (Later will refused probate for lack of capacity, cannot be used to show revocation of an earlier will. The former decision is *res judicata*). Cf. 33 Harv. L. Rev. 620 (1920).

<sup>17</sup> *Moore v. Rowlett*, 269 Ill. 88, 109 N. E. 682 (1915).

<sup>18</sup> *Lemage v. Goodban*, L. R. 1, P. & D. 57 (1865).

a gift of a lesser sum and the instrument is for some reason inoperative, the first one should continue operative to the extent that it is not superseded.

Various minute rules have been worked out for enabling a court to determine whether a later gift is cumulative or not,<sup>19</sup> such as (a) the consideration whether or not the later gift is made for the same purpose as the earlier one; (b) whether or not some of the repeated gifts are specific;<sup>20</sup> (c) whether the estate is sufficient to pay cumulations; (d) whether the testator has provided more than once for debts and funeral expenses. If the two instruments are duplicates, that is if the dates and the contents are identical, or if two identical provisions are made in the same instrument, there is no cumulation.<sup>21</sup> If they are undated or bear the same date and are inconsistent, they both fail to the extent of their inconsistency unless intrinsic evidence shows which is, in fact, later.<sup>22</sup> If no hint comes from any intrinsic evidence, then a good many courts allow the introduction of extrinsic evidence. If the later will contains a residuary clause, extrinsic evidence of intent that both shall stand is generally not admitted. If it should be decided that the later provisions are not cumulative, then it is fair to conclude that since the repeated gifts are substitutional and the earlier will is in that respect inoperative, so it is inoperative as to the provisions omitted but not expressly revoked. This may be called perhaps one form of revocation. Thus, revocation may be (a) either express, or (b) arise from inconsistency, as by giving a thing to B which had formerly been given to A, or (c) by the substitution of a new plan for the old one, even though there may be sufficient estate left to pay the omitted provisions, for the disposition of which no residuary clause has been inserted. This latter method may fairly be called substitution rather than revocation. In such event, if the substitution should prove to be inoperative, the original provision should operate, because a substitution rather than a revocation was intended.

<sup>19</sup> See 2 Jarman on Wills (7th Ed. 1930, pp. 1038-1098; 2 Williams on Executors (12th Ed. 1930, pp. 838-843); 2 Page on Wills (2d Ed. 1926) Secs. 1380-1387.

<sup>20</sup> *Sanford v. Vaughan*, 1 Phill. 39 (Ecc. 1809).

<sup>21</sup> Godolphin, "The Orphan's Legacy" (4th Ed. 1701), Pt. 3 C. 26, S. 46, p. 166.

<sup>22</sup> *Townsend v. Moore* (1905), P. 66; *In re Forman*, 54 Barb. 274 (N. Y. 1869).



The final test of inconsistency is affected by two matters: (a) whether the later instrument is a will or a codicil, and (b) whether the function of the probate court in such situations is one of integration or of construction, or both.

Thus, if the later instrument is a codicil, a greater attempt is made to render both instruments operative. The codicil is used by Godolphin as the illustration when he says that cumulation is favored. Yet there are cases where cumulation is favored as the appropriate interpretation of a later will. A presumption amounting to a maxim has sometimes been invoked in such cases, e. g., the intention previously expressed is presumed to continue.<sup>23</sup> This presumption may apply either to a will or a codicil, so it takes one of two forms, (a) a codicil disturbs the disposition made in a will no further than is absolutely necessary,<sup>24</sup> and (b) in the case of a will, "The court favors both wills."<sup>25</sup>

This proposition respecting codicils, that a codicil disturbs the dispositions of the will as little as possible, has been carried to absurd lengths in some cases. Thus, where a legatee of an integral legacy was also given a proportional share in the residue, and by codicil others were added, it has been held that such added legatees did not share in the residue, because that would disturb the original disposition. So, also, if a residuary legatee were eliminated by codicil, the remaining residuary legatees did not take the entire residue, though if the will and the codicil were read together, it is clear that in the one case the added legatee is in the same position as if he had been mentioned in the original will, and in the second case, the will should be read as if the eliminated legatee had never been mentioned.<sup>26</sup> Thus, the principle of republication, that a will is restated as amended, at the date of the codicil, was broken in upon. The

<sup>23</sup> *Franklin v. Jacobs*, 28 Ariz. 187, 236 P. 694 (1925) (An unambiguous will not revoked by a codicil possibly ambiguous).

<sup>24</sup> *Wardner v. Baptist Mem. Church*, 232 Ill. 606, 83 N. E. 1077 (1908). *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345 (1902). *Meckel v. Johnson*, 231 Ill. 365, 83 N. E. 209 (1907). For appropriate applications of the rule see *Norton v. Moren*, 206 Ky. 415, 427, 267 S. W. 171 (1924); *Lightfoot v. Beard*, 230 Ky. 488, 20 S. W. (2d) 90 (1929). A much more questionable application of the presumption was made in *Garvin v. Garvin*, 2 Ky. Opin. 564 (1867).

<sup>25</sup> *Gardner v. McNeal*, 117 Md. 27, 82 A. 988 (1911); *Williams v. Miles*, *supra*, n. 1.

<sup>26</sup> See 40 Harv. L. Rev. 70, 85-90.

quarrel, however, with the rule that previous gifts are not to be disturbed more than necessary is not so much a quarrel with the principle generally, but with the rigorous application of it where the intent of the testator is defeated. Thus, in *Waln's Estate*,<sup>27</sup> the testator gave the residue to his four sisters and a brother equally. The brother and one sister predeceased the testator. By codicil, the testator revoked the gift to his brother, but said nothing about the death of the sister. The court held that he died intestate, not only as to the share left to the sister, but also as to the share left to the brother.

On the whole, it is true that a codicil is more closely construed with a prior will than is a later independent instrument. That is, in some cases a cumulation would be inferred if the later instrument were a codicil and not if it were a will. It seems clear that a provision in a will which is not repeated in the codicil would usually stand, though there may be a non-cumulative provision in the codicil. If the later paper is a will, the omitted provision would not stand. But it requires but small evidence, whether intrinsic or extrinsic, to find that a legacy of the same sum or of an increased sum in the codicil is not cumulative.<sup>28</sup>

In *Lovering v. Balsh*,<sup>29</sup> the court emphasized the evident proposition that a will and codicil should be construed together. Testator had divided the remainder among his children after a life estate in the wife. One daughter having become dangerously ill, he executed a codicil to the effect that if she should die leaving no child, then the income from her share should go to her husband for life and at his death the corpus should be divided among the other children. The daughter survived the testator and died, leaving a husband but no issue. It was held that the testator meant the codicil to be operative only in case his daughter should predecease him. The same result should be reached if the second instrument had been a separate will. So in *Re Gilman*,<sup>30</sup> the testator, by his first will, gave a legacy to M and a large legacy to his wife, six legacies to as many employees and named an executor. There was no residuary clause.

<sup>27</sup> 156 Pa. 194, 27 A. 59 (1893).

<sup>28</sup> *Sanford v. Vaughan*, *supra*, n. 20.

<sup>29</sup> 210 Mass. 105, 96 N. E. 142 (1911).

<sup>30</sup> 121 N. Y. S. 909 (Sur. 1909).

Important changes in circumstances thereafter occurred, among them the death of his wife and the fact that he ceased operating his business. By the second will, the legacy to M was halved; the amount formerly intended for his wife was distributed among the members of her family; the names of five former employees were omitted, and the legacy to one was repeated. It appears also that the later will could be interpreted as disposing of the entire estate. If the later instrument had been a codicil, it seems probable that the same result would have been reached.

A later writing may be construed as inconsistent; (a) because a different scheme of distribution has been chosen, though there is a residue undisposed of but no residuary clause exists, or (b) because a complete substitution has been made and there is no residue, or (c) because the presence of a residuary clause indicates that a substitution has been determined upon by the testator. In the latter case it would make no difference whether the residuary legatees were identical with those in the former will or were wholly different, since the former will became inoperative by virtue of the substitution.

The court's concept of its function, whether of integration or construction, is important, but the two processes can hardly be separated.<sup>31</sup> Thus, a probate court cannot appropriately probate all duly executed wills that have not been expressly revoked and leave it to a construction court to determine the application of each to the estate to be distributed. In the very process of integrating the wills offered for probate, the court must construe them in order to find what plans of the testator have been abandoned. Sometimes we find the probate court fearful that a construction court may allow gifts to be cumulative which the probate court thinks were not intended to be so,<sup>32</sup> and for that reason will refuse probate to a will or to a portion of a will which might otherwise have been proved. It seems that the probate court should not look forward to an appeal or a contest as the appropriate means of determining how the estate shall pass under the will (wills) but must determine what wills have

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<sup>31</sup> In *Dempsey v. Lawson*, L. R. 2 P. D. 98 (1877), the court observes that its problem is what dispositions were meant by the testator rather than what instruments he intended to leave.

<sup>32</sup> *Estate of Bryan* (1907) P. 125; *Dempsey v. Lawson*, *supra*, n. 31; *Townsend v. Moore* (1905), P. 66; *Methuen v. Methuen*, 2 Phill. 416 (Ecc. 1817).

been revoked or superseded in the first instance in order to perform its function as the distributing authority. When that determination is made, it may be the proper function of a construction court to pass upon the meaning and operation of those instruments which the probate court integrates as the last will. If no appeal be taken from the finding of the probate court, such finding should, after the lapse of the proper time, be *res adjudicata*. But the construction of a probated will by the probate court is not *res adjudicata* where an action for construction is brought in a court of general jurisdiction.

If one instrument is the exact duplicate of another, there is no inconsistency and there is but one will if they bear the same date. Only one copy need be probated. It seems that a revocation of one copy is a revocation of the entire will as expressed in the two copies.<sup>33</sup> It is also true that a will of a later date identical in its substance is not a duplicate and is commonly said to be revocatory.<sup>34</sup> The sense in which revocation is here used has been considered above. If two wills bear the same date but are not duplicates and are inconsistent with each other, intrinsic evidence may show which is later, but extrinsic evidence for that purpose is said to be inadmissible.<sup>35</sup>

The execution of a later will does not, of itself, revoke the earlier one, save in Alabama.<sup>36</sup> The contents of such later will, if lost, must be shown to be inconsistent, or else a revocatory clause must be proved if the first still existing will is not to stand.<sup>37</sup> If there is no revocatory clause, what more than mere execution of a later will must be shown if there is to be a revoca-

<sup>33</sup> *Odenwallder v. Schoer*, 8 Mo. App. 458, 464 (1880); *Crossman v. Crossman*, 95 N. Y. 145 (1884); *Doe v. Strickland*, 8 Com. B. 724 (1849).

<sup>34</sup> *O'Neill v. Furr*, 1 Rich. L. 80 (S. C. 1844).

<sup>35</sup> *St. Mary's Orphan Asylum v. Masterson*, 122 S. W. 587 (Tex. Civ. App. 1909).

<sup>36</sup> *Bruce v. Sierra*, 175 Ala. 517, 57 So. 709 (1912). But see annotation to Sec. 10600 of Alabama Code (1923).

<sup>37</sup> *Swinburne on Wills* (6th Ed. 1743) 524; *Seymour v. Northworthy*, Hardres 376 (Exch. 1665); *Harwood v. Goodright*, 1 Cowp. 87, 89, 91 (K. B. 1774); *Will of Dunahugh*, 130 Ia. 692, 107 N. W. 925 (1906); *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705 (1903); 87 Neb. 455, 127 N. W. 904 (1910) (See 89 N. W. 451); *Nelson v. McGiffert*, 3 Barb. 158 (N. Y. Ch. 1848).

tion in any degree? The general rule is that the inconsistency must be such that they cannot stand together.<sup>38</sup>

This strict rule must be modified to the extent that a revocation will be declared, even though there is some remainder undisposed of if the two plans are wholly disparate and one was intended as a substitute for the other.<sup>39</sup>

It may happen though, but rarely, that an entire estate can be disposed of without leaving a residue and the fact of the absence of a residuary clause in such cases would be unimpor-

<sup>38</sup> *Lemage v. Goodban*, *supra*, n. 18; *Austin v. Oakes*, 117 N. Y. 577, 23 N. E. 193 (1890).

<sup>39</sup> *Plenty v. West*, *supra*, n. 1 (First will gave the entire estate to trustees to be divided between three persons, A, B, and C, on reaching their majority. The later one gave a specific legacy to D, successive life estates in all testator's realty to several other persons, and his copyhold to E. This left the remainder expectant upon the various life estates undisposed of. This contrast in the disposing scheme was held sufficient to revoke the entire will); *Dempsey v. Lawson*, *supra*, n. 31 (There was no provision in the earlier will that was retained in the later one unless it was the residuary clause. There was a considerable residue, but the court held there was a complete change of scheme and an entire substitution was intended); *Estate of Bryan*, *supra*, n. 32 (No residuary clause in the later will. A and B were made residuary legatees and executors by the first will, which also created a trust for the benefit of S (T's sister) for life, then to N (T's niece) for life, corpus over to N's issue. There was also another legacy for N and one in favor of C. In the second will, A and B were again named executors, but the remainder of the trust fund to N, corpus over to N's children, was entirely omitted; the other legacy to N was cut down, and C's legacy was omitted and one in favor of D was inserted. The following considerations induced the court to hold the former will entirely inoperative: (a) the apparently intentional failure to name A and B residuary legatees, though repeating their appointment as executors; (b) the failure to name N and her issue as beneficiaries of the trust fund, but remembering N by cutting down the other legacy; (c) each will provided for the payment of debts and funeral expenses which later provision must be substitutional; (d) the fact that similar legacies were made payable at a later time by the second will. The fact that the later will but not the first was called "my last will" was thought to be a consideration); *Siemers' Estate*, 202 Cal. 424, 261 P. 298 (1927) (Payment of cumulative legacies would require sale of the realty—no residuary clause); *In re Iburg*, 196 Cal. 337, 238 P. 74 (1925); *Kearns v. Roush*, 106 W. Va. 663, 146 S. E. 729 (1929). *Marx's Estate*, 174 Cal. 762, 164 P. 640 (1917) is *contra*. (The second will was entirely inconsistent with the first, but there was an undisposed of residue due to the partial inefficacy of a gift to charity and no residuary clause. Held that the provisions of the first will omitted in the second are to be paid. One wonders what difference, if any, there would be in the result if there were a statute in all cases like that in California, and whether the result in the Marx case is a proper interpretation of that statute. See Deering's Probate Code (1931) sec. 72 to the effect that a later will does not revoke an earlier one unless it contains an express revocatory clause or is wholly inconsistent with it.

tant. Thus, if one gives "all my estate"<sup>40</sup> there is no occasion for a residuary clause. But the naming of various items of realty and personalty, including bank deposits, which include the entire estate, may do the same thing. In such case a later will may revoke the earlier one by complete inconsistency, and there is no residue.<sup>41</sup>

#### REVOCATION BY INCONSISTENT INOPERATIVE INSTRUMENT\*

Assuming that the inoperative instrument contains no general revocatory clause, four positions have been taken with respect to the result where the later will is inconsistent with the earlier one: (a) There is a complete revocation; (b) There is no revocation; (c) There is a conditional revocation; (d) There is a revocation which may be set aside upon appropriate equitable conditions, which leaves the original will unmolested.

<sup>40</sup> *Ludlum v. Otis*, 15 Hun. 410 (N. Y. 1878).

<sup>41</sup> See, for example, *Leslie v. Leslie*, 6 Ir. Eq. 332 (1872) (difficult to distinguish on the facts from Bryan's Estate, *supra*, n. 32); *Petchell's Goods*, L. R. 3 P. & D. 153 (1874); *Pepper v. Pepper*, 1 R. 5 Eq. 85 (1870); *Goods of Hodgkinson* (1893) P. 339; *Re Fisher*, 4 Wis. 254 (1854); *Cadell v. Wilcox* (1898) P. 21; *Reeves v. Reeves*, 2 I. R. 521 (1909); *Gardner v. McNeal*, *supra*, n. 15; *Re Armstrong's Will*, 210 N. Y. S. 427, 432 (Sur. 1925); *Re Bradford*, 1 Pars. Sel. Eq. Cas. 153 (Pa. 1845); *Kearns v. Roush*, *supra*, n. 39.

\* It is interesting to note some of the possible reasons why testamentary instruments may be inoperative in whole or in part. Thus, it may fail because of *uncertainty* (*Dudley v. Gates*, 124 Mich. 440, 83 N. W. 97 (1900) (gift for indefinite charitable purposes); *Carpenter v. Miller*, 3 W. Va. 174 (1869) (for the propagation of the Gospel); or because it was executed *within the forbidden statutory period*. (There are many of these failures; see, for example, *Melville's Estate*, 245 Pa. 318, 91 A. 679 (1914); or because its purpose is *illegal*, e. g., *Gossett v. Weatherly*, 58 N. C. Eq. 46 (1859) (award of freedom to a slave in a slave state); or because it *exceeds the amount permitted by statute to be given for a particular purpose*, *Marx's Estate*, 174 Cal. 762, 164 P. 640 (1917); or because it *makes no sense* (*Conoway v. Fulmer*, 172 Ala. 283, 54 So. 624, 34 L. R. A. N. S. 963 (1911) (T's will devised a given number of acres of undescribed land, but in such case there would probably be no revocation without a revocatory clause); or because *will cannot be found nor its contents proved*—(*Colvin v. Warford*, 20 Md. 357 (1863) (a revocatory clause must be proved); or because of the rule or statute against remoteness of *vesting* (e. g., *Security Co. v. Snow*, 70 Conn. 288, 39 A. 163 (1898); *Blakeman v. Sears*, 74 Conn. 516, 51 A. 517 (1902); *U. S. Fidelity Co. v. Douglas*, 134 Ky. 374, 120 S. W. 328 (1909), *Re Pilsbury*, 99 N. Y. S. 62 (App. D. 1905); or because the *beneficiary is incapable of taking*. French's Case, 1 Roll. Abr. 614 (O) (1587) (devise to a parish); *Roper v. Ratcliffe*, 8 Vin. Abr. 141, Devise R. (H. L. 1714); *Roper v. Constable*, 2 Eq. Cas. Abr. 359 (Eng. 1713) (Devisee is a Papist); or because the *beneficiaries were dead* when the will was made or *predeceased the testator* or all

The first position, that a complete revocation occurs, was clearly taken by the early English cases.<sup>42</sup> *Baker v. Story*<sup>43</sup> is perhaps the most significant of these cases. In the same year in a House of Lords decision on a Scottish appeal,<sup>44</sup> Lord Cairns strangely declared, "No case can be produced where . . . a mere alternative disposition not valid in itself has been used to revoke an earlier and effective disposition of the same property."<sup>45</sup>

*Duguid v. Fraser*<sup>46</sup> is the first important case which effected a change in the course of English decisions. The testatrix had a non-exclusive power of appointment among her children and exercised it. On the death of one, she attempted by codicil to appoint that share to his issue and it was held that there was no intention to revoke. The court seems to take here the second position, not that there was a conditional revocation, but that there was no revocation because testatrix did not so intend.

the dispositions were made *in favor of the attestors*; *Laughton v. Atkins*, 1 Pick. 535 (Mass. 1823) (dictum)—*Cf. Moore v. Rowlett*, 269 Ill. 38, 109 N. E. 632 (1915) (Where an attester is someone other than an interested person, for in such latter case the statute validates the will but avoids the gift. See 25 Mich. L. Rev. 238, 245 n. 29).

<sup>42</sup> *French's Case*, 1 Roll. Abr. 614 (O) 4 (1587) ("Si home devise terre al un a puis ceo devise al poor de tiel paroch, que est void, pur ceo que ils nont capacite a prendre, encore ceo est un revocation"); *Roper v. Radcliffe*, *supra*, n. 16; discussed at length in 1924 A. C. 653, 673 (An invalidly executed will no revocation, but an inoperative will may revoke); *Shove v. Pineke*, 5 T. R. 124 (K. B. 1793) (Deed will revoke a will, even though it may be inadequate as a conveyance); *Beard v. Beard*, 3 Atk. 72 (1744) (Will revoked by deed poll though inoperative as a deed); *Ex Parte Ilchester*, 7 Ves. 348 (1803), was also regarded as taking this view (See *Ward v. Van der Loeff* (1924) A. C. 653); *Tupper v. Tupper*, 1 K. & J. 665 (Ch. 1855) (Express revocatory clause in codicil revoked a prior will, giving the property to charities. The gift to charity in lieu thereof was invalid. Court held revocation effective as there was no way to determine the real intent); *Quinn v. Butler* (L. R. 6 Eq. 225 (1868) (Exercise of power of appointment. This followed by an express revocation in a later will, and exercise was void because power was non-exclusive. The revocation was allowed to stand because it was not possible to learn testator's intent); *Baker v. Story*, 31 L. T. N. 631 (1874) (Gift to wife absolutely. By later will her interest was changed to a life estate, remainder on a void gift to charity).

<sup>43</sup> *Supra*, n. 42.

<sup>44</sup> *Alexander v. Kirkpatrick*, L. R. 2 H. L. Sc. 397 (1874).

<sup>45</sup> Lord Blandesburgh, in *Ward v. Van der Loeff*, *supra*, n. 42, p. 685, explains this statement by saying that reference was made to those cases only where the later instrument was insufficiently executed as a will.

<sup>46</sup> 31 Ch. 449 (1886).

There was no revocatory clause as there had been in certain earlier cases and no authority was cited whatever.<sup>47</sup>

*Ward v. Van der Loeff*<sup>48</sup> is a recent and elaborately argued case in which extended opinions were written by each Viscounts Haldane and Cave and by Lords Dunedin, Phillimore and Blanesburgh. It appears that the testator in his will had given his wife a power of appointment over certain property, among the children of his brothers and sisters, without any limitation and without mentioning any period of vesting, so that the interests of the children would vest at birth and the class to take would be limited to those living at the death of testator's wife. By codicil he revoked the power of appointment and declared that the interest of any child should not vest until it, being a son, should reach 21, or, being a daughter, should reach 21 or should marry under that age. This provision for vesting was too remote. The Chancery Court believed that there was a revocation because of the material variation in the class to take, the variation in the terms of the gift not being discussed.

The House of Lords overruled the lower court decision and held there was no revocation. It was the view of Viscount Haldane<sup>49</sup> that a void disposition was no revocation and the fact that a new and different class was constituted in the codicil made no difference if the provision was wholly inoperative. The original gift does not fail because there was no independent intention to revoke it. It thus appears that he adopted the doctrine of dependent relative or conditional revocation, the third theory mentioned above.

It was Viscount Cave's view<sup>50</sup> that there was a mere modification of the class made in the codicil and no revocation at all,

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<sup>47</sup> In *Bernard's Settlement* (1916), 1 Ch. 552, the testatrix's desire was to alter an absolute gift to one beneficiary so that it should be held in trust and "so far and no farther" did she revoke the prior gift. The court thought that *too* much emphasis had been laid in *Duguid v. Fraser* on the absence of a revocatory clause. There is obviously here no absolute revocatory clause. If she had said "I revoke in order to give effect to the trust provision, the revocation would be absolute according to the view here taken. But, 'I revoke so far as to accomplish this purpose and no farther' seems to expressly condition the revocation upon the operation of the trust provision. The court thought there was no distinction between express revocation and revocation by inconsistency.

<sup>48</sup> *Supra*, n. 42, overruling *Re Burnyeat* (1923), 2 Ch. 52.

<sup>49</sup> P. 661.

<sup>50</sup> P. 665.



because none was intended. He cited earlier cases which had so held<sup>51</sup> and continued by saying that "the court discovers an intention to revoke only in the altered disposition which is attempted to be made by the second instrument, and if that disposition fails, then also the court must fail to perceive any indication to revoke the first, the court not being able to find that there is any *inconsistent disposition at all* in consequence of that which was intended to be such having wholly failed to take effect." His view, then, is that there was no revocation. Neither of the first two opinions discuss the earlier cases holding that a validly executed inconsistent but inoperative will revokes the earlier will.

Lord Dunedin<sup>52</sup> said that if the codicil contained words of revocation they should be given effect, but if there were no such words, then there is no revocation, unless it is necessarily implied by reason of the inconsistency of the later with the earlier provision. Here is pretty clearly expressed the theory of revocation by inconsistency, more fully outlined later.<sup>53</sup>

Lord Phillimore<sup>54</sup> relied upon the doctrine of dependent relative revocation, repudiating the statement by Jarman,<sup>55</sup> that "If the second devise fails not from the infirmity of the instrument but from the incapacity of the devisee, the prior devise is revoked." Jarman's statement, however, is fortified by the early cases.<sup>56</sup>

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<sup>51</sup> *Duguid v. Fraser*, *supra*, n. 46; *Alexander v. Kirkpatrick*, *supra*, n. 44; and *Morley v. Rennoldson*, 1 Chancery 449 (1895) (Testator by will gave the residue to his daughter for life then over to her children and in default of children, over. By codicil he stated that in consequence of her nervous debility it was his will that she should not marry and in case of her marriage or death, he directed that the residue should go to those to whom the gift over had been made in the will. After the death of the testator, the daughter married and died, leaving issue. The condition in restraint of marriage was void, and it was held that upon the true construction of the codicil, the property was to go over on her death or marriage only if she should die without issue).

<sup>52</sup> P. 667.

<sup>53</sup> The writer is unable to interpret the language of Lord Dunedin later used in his summarization, p. 671, where he seems to distinguish between implied revocation and revocation by inconsistency and says that in the latter case there is no revocation if the inconsistent provision is inoperative.

<sup>54</sup> P. 763.

<sup>55</sup> In 6th ed., pp. 169-170.

<sup>56</sup> *Supra*, n. 42.

Lord Blanesburgh<sup>57</sup> agreed with the majority so far as this particular claimant is concerned who would take under either provision. He says that if the later will gives the property to a different person or for a purpose different from that declared in the first one, then there is a revocation as clearly as if express revocatory words had been used, and he limits for himself the rule that there is no revocation to the facts of this case and does not place his decision on general grounds.<sup>58</sup>

The three latter opinions all discuss *Roper v. Radcliffe*<sup>59</sup> and seek to explain it by its particular facts and to cut down its implications. It will be noted then that of the five opinions, two adopted the doctrine of dependent relative revocation, two held there was no revocation where the later provision is inoperative and one said there was no revocation by inconsistency so far as this claimant was concerned, but affirmed that there is a revocation where the later provision is inconsistent, though inoperative. *Ward v. Van der Loeff* may be regarded, as holding that there is no revocation where the later provision is inoperative. This means, at least so far as the opinions of former judges are concerned, that the original stands, though the later provision is inconsistent.

It must be admitted that there is even more doubt about the result in the American cases. Sometimes an inoperative will is regarded as being similar in effect to a will invalidly executed.<sup>60</sup> This seems to mean that there is no distinction between invalidity in execution and ineffectiveness in cases where there is a valid execution. It of course may be suggested that unless a validly executed will contains a revocatory clause or is sufficient in its attempt to dispose of the property, it does not remove the estate or part of it from the grip of the earlier will.<sup>61</sup> Whether there is an intent to revoke is said to be a jury question.<sup>62</sup> But it is more commonly held that there is an inconsistency which may be the exact equivalent of a revocatory clause, though the incon-

<sup>57</sup> P. 681.

<sup>58</sup> P. 685.

<sup>59</sup> *Supra*, n. 15.

<sup>60</sup> *Boylan v. Meeker*, 28 N. J. L. 274 (1860); *Dower v. Seeds*, 28 W. Va. 113 (1886) (dictum).

<sup>61</sup> Cf. suggestion in 33 Harv. L. Rev. 337, 353 (1920).

<sup>62</sup> *Barksdale v. Hopkins*, 23 Ga. 332 (1857); *Wolfe's Will*, 185 N. C. 563, 117 S. E. 804 (1923). In England the question is decided by the probate court. *Jenner v. Finch*, *supra*, n. 16.

sistent provisions are inoperative. Our courts commonly take one of three views, either that there is a conditional, or an absolute revocation,<sup>63</sup> or no revocation.

The question of revocation by inoperative later instrument has arisen in many jurisdictions in this country, and it has arisen with especial frequency in New York and Pennsylvania. The later instrument may affect (a) private gifts, and (b) charities, and it is convenient to deal with them in this way.

With respect to private gifts, in the first place the inoperative will probably revokes the prior gift in all cases where there is a revocatory clause.<sup>64</sup> This holding seems sufficient to show that we cannot solve the general problem by the inquiry whether the revocation is or is not conditional. An implied condition can be read into such a revocatory clause as well as into a mere inconsistency.<sup>65</sup>

Secondly, there is a revocation in the majority of states if the later inoperative provision is essentially different from the former.<sup>66</sup> But if the inoperative provision purports to give the property to the same beneficiary, the former provision is not

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<sup>63</sup> *Laughton v. Atkins*, 1 Pick. 535 (Mass. 1823) (dictum); *Lougee v. Wilkie*, 209 Mass. 184, 95 N. E. 221 (1911) (See comment in 40 Harv. L. Rev. 71, 102 (1926); 25 Mich. L. Rev. 238, 263 (1927); *Jones v. Murphy*, 8 Watts & S. 275 (1844) (dictum); *Marx Estate*, *supra*, n. 39 (The second will was partly inoperative because it contained an excessive gift to charity. It purported to make a complete disposition of the property. The legacies of the earlier will omitted in the later one could be paid out of the funds ineffectively given to charity. Held, the second will is not inconsistent with the first and the legacies should be paid). An interesting result was reached in *Re Rose*, 273 P. 92 (Cal. App. 1928). The first will provided a specific legacy for a son. The later will overlooked him entirely. The effect was that the son took such share as he would have had if the testator had died intestate.

<sup>64</sup> *Conway v. Fulmer*, 172 Ala. 283, 54 So. 624, 34 L. R. A. N. S. 963 (1911); *In re Rose*, *supra*, n. 63; *Barksdale v. Hopkins*, *supra*, n. 62; *Colvin v. Warford*, 20 Md. 357 (1863); *Dudley v. Gates*, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959 (1901); *Rice Co. v. Scott*, 88 Minn. 386, 93 N. W. 109 (1903); *Hairston v. Hairston*, 30 Miss. 276 (1855); *Vining v. Hall*, 40 Miss. 83 (1866); *Melville's Estate*, 245 Pa. 318, 91 A. 679 (1914); *Rudy v. Ulrich*, 69 Pa. St. 177 (1871); *Teacle's Estate*, 153 Pa. 219, 25 A. 1135 (1893).

<sup>65</sup> *Read v. Manning*, 30 Miss. 308 (1855).

<sup>66</sup> *Blakeman v. Sears*, 74 Conn. 516, 51 A. 517 (1902) (Inoperative codicil made a radical change in the disposition from that in the will—no general discussion); *U. S. Fidelity Co. v. Douglas*, 134 Ky. 374, 120 S. W. 328 (1909); *Gossett v. Weatherly*, 58 N. C. Eq. 46 (1859); *Carpenter v. Miller*, 3 W. Va. 174 (1869) (dictum).

revoked.<sup>67</sup> Thus, in *Re Pilsbury*,<sup>68</sup> the original will made a gift of personalty to an illegitimate child. The second will likewise provided for her, but the provision was invalid as a perpetuity. If it revoked the earlier will, all the property would pass to the legitimate children. It was held that though the later will must be probated it would not revoke the former. The leading American case is *Austin v. Oakes*.<sup>69</sup> It is almost identical with *Duguid v. Fraser*,<sup>70</sup> which it relied upon. The court declared that the intention to revoke was conditional, but it also said, in substance, that there was no revocation. "Can something be repugnant to nothing and turn that nothing into something?" The two positions here taken are inconsistent with each other. It seems clear that there was no conditional revocation. The testatrix did not have the thought, either expressed or unexpressed: "The instrument which I am executing shall have the effect of revoking the former one only if it is operative and not otherwise." She had no doubt about its operative effect.

*The Charity Cases.* If the original gift were made to charity and the codicil gave the property to a totally different but illegal purpose, it is clear that there is an intention to revoke, and we cannot say that if the later disposition cannot take effect the testator desires to return to the earlier one. So if the will makes a private distribution and the codicil makes an inoperative gift to charity,<sup>71</sup> there is a revocation because of the inconsistency. But suppose that by the will there is a gift to charity and the codicil or later will gives the same property to the same charity and the latter provision is inoperative because not executed within the period required by statute for an effective

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<sup>67</sup> *Security Co. v. Snow*, 70 Conn. 288, 39 A. 153 (1898) (Codicil changed the absolute gift into a trust void because of the statute against perpetuities).

<sup>68</sup> 99 N. Y. S. 62 (App. D. 1906) (Cf. *Altrock v. Vandenburg*, 25 N. Y. S. 851 (1893) (Substantially similar).

<sup>69</sup> 117 N. Y. 577, 23 N. E. 193 (1890). In *Freel v. Robinson*, 18 O. L. R. 651 (1909), however, it is said that the doctrine of dependent relative revocation is inapplicable (a) where there are express words of revocation, and (b) is applicable only where the revocation is by act to the document because only such acts are equivocal in nature.

<sup>70</sup> *Supra*, n. 46.

<sup>71</sup> *Melville's Estate*, *supra*, n. 64; *Carpenter v. Miller*, *supra*, n. 66 (The codicil revoked a private gift and devoted the property to encourage the preaching of the gospel).

gift to charity, is the former will revoked? In *Hoffner's Estate*,<sup>72</sup> the court held that the charity could not take under either will. It seems that here is a fundamental error in the court's reasoning. It can scarcely be said that a will which makes the same provision as the earlier will is inconsistent with it. An earlier provision may become inoperative if the property passes under the later one to the same beneficiary, but there is no inconsistency.<sup>73</sup> With the proposition in mind that an earlier provision is inoperative but not revoked in cases where the later provision gives the same property to the same beneficiary, the authorities may be examined. It may be repeated that the assumption here is that the later will contains no revocatory clause.

The New York cases are irreconcilable *inter se*. Thus, in *Canfield v. Canfield*,<sup>74</sup> the testator devoted one-fourth of his property to each of two local charities and one-half to a foreign charitable institution. By a codicil executed within two months of his death he directed that the three beneficiaries should share equally. The statute did not apply to the foreign beneficiary, so its share was cut down but not entirely revoked, whereas it was held that the other two gifts were revoked. If the theory proposed herein were applied, that there is a revocation of the will only to the extent that the codicil makes an inconsistent though ineffective disposition, the second will not being inconsistent, there should be no revocation, as these two shares were neither revoked nor cut down. *Hayman's Estate*<sup>75</sup> may be regarded as following the same theory as was adopted in the *Canfield* case and only a partial revocation should have been declared. Certain charities were provided for in the will. The inoperative codicil revoked the gifts to some of the charities

<sup>72</sup> 161 Pa. 331, 29 A. 33 (1894) (A constructive trust ultimately was declared).

<sup>73</sup> See especially *O'Leary v. Douglass*, 1 L. R. Ir. 115, 3 L. R. Ir. 323 (Ch., etc., 1878) (The second will without revocatory clause contained a devise to charity, void because will was executed within three months of death. It was identical with the first will and each made a complete disposition of the estate. Held repetition of a gift does not show an intent to revoke it and the gift under the former will stands. See also *Birks v. Birks*, 4 Sw. & Tr. 31 (Ecc. 1865).

<sup>74</sup> 4 Dem. 111 (Sur. N. Y. 1885). See also *Benedict's Will*, 11 N. Y. S. 252 (Sur. 1889).

<sup>75</sup> 237 N. Y. S. 215 (Sur. 1929).

and substituted others. So in *Ela v. Megie*,<sup>76</sup> gifts were made to eight charities. The inoperative second codicil reduced the bequest to three and dropped the other five. The court held that this was no place to apply the doctrine of dependent relative revocation and the earlier provisions were all revoked. Under the view here proposed, there would be no revocation as to any charitable gifts which were not mentioned and the gifts which were simply cut down would pass under the original instrument as so altered. That is, the earlier instrument stands so far as it is consistent with the later one. A difficulty arising from the doctrine of conditional revocation, that the court must reject or sustain the earlier instrument *in toto*, is thus avoided.

On the other hand, a different result was reached in *Re Farmers Loan & Trust Co.*<sup>77</sup> The will gave the residue to various charities. The inoperative codicil revoked the residuary clause, but revived it so far as it applied to charities. The gift to charities did not fail.

The Pennsylvania cases also are not consistent with each other. Thus, in *Hoffner's Estate*<sup>78</sup> the inoperative codicil gave the same sum to the same charity named in the original will. If the court had adopted the view that a later will revokes an earlier one only when it is inconsistent, the original gift would have stood.

It seems now that Pennsylvania has pretty clearly about faced in the matter. Thus, in a recent case it was held that a gift to charity was not wholly defeated by an inoperative codicil (will) which diminishes the legacy and also postpones the time of enjoyment.<sup>79</sup> In *Sloan's Appeal*<sup>80</sup> where the inoperative

<sup>76</sup> 219 N. Y. 112, 113 N. E. 800 (1916).

<sup>77</sup> 122 N. Y. S. 956 (App. D. 1910).

<sup>78</sup> *Supra*, n. 72; *Price v. Maxwell*, 23 Pa. 23 (1857), would be essentially similar were it not for the revocatory clause. See also *Lutheran—Appeal*, 113 Pa. 32, 5 A. 752 (1886); *Melville's Estate*, *supra*, n. 64; *Teacle's Estate*, *supra*, n. 64.

<sup>79</sup> *Bingaman's Estate*, 281 Pa. 497, 127 A. 73 (1924); see also *Appeal of Carl*, 106 Pa. St. 635 (1884); *Morrow's Estate*, 204 Pa. 484, 54 A. 342 (reduction).

<sup>80</sup> 168 Pa. St. 422, 32 A. 42 (1895). *Freel v. Robinson*, *supra*, n. 69, discussed in 5 So. Cal. L. Rev. 273, 288 (1931) is not dissimilar. T from the residue left legacies to her sister and brother and nephew, with the final residue to her sister. On the death of her brother, she executed a codicil saying: "I revoke the above and give to my sister all the money I now possess save the legacy named above to my nephew." The sister's husband was an attester of the codicil. Held legacy to the sister revoked. If a testator revokes a prior gift and gives

codicil expressly revoked the earlier gift and gave a smaller sum "instead thereof" there was no revocation but a mere cutting down, inasmuch as the revocation was immediately qualified. The result in this case is sound, since the earlier gift is not wholly inconsistent with the later one. Stress was laid in *Bingaman's Estate*<sup>81</sup> upon the fact that the later instrument was, in substance, a codicil and so should be more closely interpreted with the will, but the fact that the later instrument was a codicil is without significance in this case.

A difficulty arising under the doctrine of dependent relative revocation has been mentioned above, viz., that it requires either a complete revocation or none at all. To make the argument for a different view clear, the doctrine of dependent relative revocation should be stated. As first used, it signified a revocation in which the revoking act was done with reference to another act which act was meant to be an effectual disposition and which will cause a revocation or not according to the efficacy of the relative act. Professor Warren showed that this classification was misleading and that two classes of cases were dealt with, viz., conditional revocations and revocations under a mistake. In either class the so-called revocation may be caused either by act to the document or by subsequent writing. Under conditional revocation, the testator is in doubt about the efficacy of the relative act and impliedly revokes only on condition that the relative act is efficacious. Illustrations of this are likely to be exceedingly rare. It is unlikely that a testator would commune with himself after this fashion: "I do not intend this act to be a revocation, I am doing it expecting that it will constitute a revocation only in the event that another instrument I have executed [am now executing, or am about to execute" (the relative act)] "shall prove ineffective." He would not likely have it drawn in such a way that its effectiveness would be a matter of doubt to himself. Where the revocation is made

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"instead thereof" a sum greater or less, it is held that the words "instead thereof" qualify the words of revocation so that the new gift may still be effective up to but not more than the original gift, even though the later gift is inoperative. It seems entirely clear here that the later gift was given "instead thereof" and that there was no sufficient reason why the original gift should not stand

<sup>81</sup> *Supra*, n. 79.

under a mistake (the usual situation) Professor Warren shows<sup>82</sup> that courts have, in effect, set the revocation aside and have thus reinstated the original will. This, he concludes, should be done, if at all, only upon equitable grounds which are present and are sufficient to warrant the court in believing that the testator would not desire a revocation if he could be asked about it. It would therefore be assumed that if the earlier will gave the property to one person and the later, in effect, gave it to another, there is no equitable ground for setting the latter aside. The failure of the later gift does not indicate a desire of testator to return to his original plan.

It seems that whether one says that the earlier will is conditionally revoked or revoked under a mistake where there are equitable grounds for setting the revocation aside, still if the prior will stands, or is restored, it stands or is restored as an entirety. Thus, in one case<sup>83</sup> the testatrix gave the residue to her uncle absolutely. The codicil cut this down to a life estate, remainder to charity, which latter gift was void. The court, because the first beneficiary was testatrix' favorite uncle, held that she meant to cut down the gift to him only if the gift over could be effective. It seems clear that there was no feeling of condition present in the mind of the testatrix. It accordingly seems that the first will should operate only to the extent of its consistency with the later one and that the remainder should have been regarded as undisposed of. The adoption of the rule of revocation under a mistake requires the court either to set aside the revocation and restore the entire earlier will or else the revocation stands and the earlier gift fails entirely. Professor Warren alone, so far as this writer has found, suggests the fourth view referred to above and thinks, in these cases where the original provision has been allowed to stand, the courts have unconsciously set aside the revocation. This, if done at all, should be done only on equitable grounds where the intent of the testator is reasonably apparent. Save in one case<sup>84</sup> that possibility has not been remotely referred to so far as this writer has found. Rarely, save in this situation, have the courts,

<sup>82</sup> 33 Harv. L. Rev. 337 (1920); 1 Page on Wills, §§ 449-453 (1928).

<sup>83</sup> *Elwell v. Sneed*, 136 Tenn. 602, 191 S. W. 131 (1917), 5 A. L. R. 303.

<sup>84</sup> *Onions v. Tyrer*, *supra*, n. 15.



especially American courts, exercised the power of reformation of wills and that is substantially what this view involves. It does not seem that this group of cases which is so commonly placed under the aegis of dependent relative revocation requires us to say either that there is always a revocation, or no revocation, or a conditional revocation, or that there was a revocation which, on equitable principles, may be set aside. The principle of inconsistency properly applied will frequently reach a similar result, but probably not always so. If there is a revocation it is either set aside or not set aside, but if we rely upon inconsistency, the prior gift may prevail wholly or only in part where there is no inconsistency or a partial inconsistency. This writer at this point desires to suggest that a modification of the Warren theory be assumed, at least where the relative act is not an act to the document but is a purported revocation by a subsequent validly executed but inoperative disposition and contains no express words of revocation. It is this that the earlier will should continue to be operative to the extent that it is consistent with the later will, but no further. This view is implicit in the opinion of Lord Blanesburgh in *Ward v. Van der Leoff*,<sup>85</sup> where he agrees with the other four judges in the result because the claimant comes within the class created both by the will and the codicil. It is also intimated in the opinion of Lord Dunedin.

This rule is implicit in many American cases but has been occasionally confused as in *Austin v. Oakes*<sup>86</sup> with (a) conditional revocation and with (b) the idea that if the inconsistency is inoperative it does not revoke at all (as in *Marx' Estate*)<sup>87</sup> because it does not remove the property from the grip of the earlier will. It is not believed that the adoption of this view will remove all possible difficulties. It will, in general, accomplish the presumed intention of the testator. The only really new proposal is that a later gift of the same thing to the same person should not be regarded as revocation of the earlier one. It should rather be regarded as a ratification or reaffirmation of it and the principle should not be limited to the cases where the later instrument is a codicil. Naturally, difficult applica-

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<sup>85</sup> *Supra*, n. 42, at p. 681.

<sup>86</sup> *Supra*, n. 69.

<sup>87</sup> *Supra*, n. 39.

tions of this principle of inconsistency may arise as where the original gift is to a charitable institution for a named use and the later inoperative will gives the same gift to the same institution for a different use. The proper result here is no more difficult to reach than it is in other cases of inconsistency.

A recent writer regards Mr. Warren as all wrong, or nearly so.<sup>88</sup> He says that Warren's theory of revoking under a mistake and setting aside the revocation where there are sufficient reasons for so doing, is not even logical. His objection is that after a will has been revoked it must be republished in order to become again effective. He argues that since there is no republication it is therefore illogical to say that the former will becomes effective when the revocation is set aside. It seems impossible to agree with that view. The thing that happens when a revocation is set aside is like that which happens when a contract or any other document is wholly set aside. For the purposes of the case, the former will is thereafter to be regarded as never having been revoked. It is entirely unsound to speak of it as being "revived" for it has never been dead, that is to say, the court's act in setting the revocation aside restores the will to its first position.<sup>89</sup>

Incidentally, one must disagree with his conclusion reached in the case of *Lougee v. Wilkie*,<sup>90</sup> where the will made an absolute gift to the beneficiary, but the codicil to which the beneficiary was an attester cut this down to a life estate. Mr. Cornish thinks that, on the principle of conditional revocation, the original gift may stand. If this be merely a problem of dependent relative revocation, one might argue, of course, that if the testator knew that the second gift could not be effective he would prefer to have the original will and larger gift take effect. The case would then be similar to those cases where, by act to the document, the testator has canceled a gift to a legatee and interlined a smaller gift; but the court said that "the provision of the original will remains unchanged by this provision." It therefore follows the view later adopted in the majority opinion expressed in *Ward v. Van der Loeff* to the effect that a later in-

<sup>88</sup> Cornish, "Dependent Relative Revocation," 5 So. Cal. L. Rev. 273, 393 (1931).

<sup>89</sup> *Spear v. Rosenhaus*, 274 Ill. 237, 113 N. E. 622 (1916).

<sup>90</sup> *Supra*, n. 63.

operative but inconsistent instrument does not revoke the former. A more nearly sound and desirable result may be reached in this case by saying either (a) that the codicil is valid and operative because like an heir or distributee the attester is competent where the act of attestation is an act against interest,<sup>91</sup> or (b) if the codicil is inoperative, still the original will is consistent with it to the extent of awarding a life estate and is revoked only as to the remainder.

The theory which this paper seeks to set forth is that a subsequent inoperative will revokes the prior will only to the extent of its inconsistency (when there are no express revocatory words). Thus, the cutting down of a prior gift is not an entire revocation. Unless the later will is operative, the earlier one never ceased to be at least partially operative.

A test of this theory may be suggested. Suppose that certain dispositions of an earlier will are repeated verbatim (or in part) in a later will and are not intended (by hypothesis) to be cumulative. Assume also that the later will is revoked by destructive act,<sup>92</sup> what effect will this revocation of the later will have upon the earlier one? The common assumption is that the earlier will became revoked and so would not in many jurisdictions be revived. It may be argued against the present theory that if the earlier will merely became inoperative instead of revoked, it becomes operative when the later will is out of the way, and this conflicts with principle as well as with authority. The answer would be that nothing has happened which makes the inoperative will again operative and the result is the same as if it were regarded as revoked. On the other hand, in states where revival is permissible, the earlier will would again become operative. Hence, the test applied does not conflict with the theory proposed.

*The Residuary Clause.* The common statement that where there are two wills the former is revoked only in case of absolute necessity and the two are to be probated together to the extent possible is to be qualified by two considerations. One of them is suggested by the inquiry as to what is to be done where the second will repeats, alters or omits some provisions in the former

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<sup>91</sup> See 25 Mich. L. Rev. 238, 251.

<sup>92</sup> *M'Ara v. M'Cay*, L. R. 23 Ir. 138 (1889).

will. Are those dispositions repeated or altered to be regarded as cumulative and are those omitted to be regarded as still operative? Secondly, in such case, does the presence or absence of a residuary clause affect the result? Godolphin<sup>93</sup> says:

"If a certain quantity be twice bequeathed, it is twice due, unless the last will of the testator were expressed with an intent of ademption of the first. Understand this, when it is in two distinct writings as in a testament and a codicil—for the twice bequeathing to the same person the same quantity in the same writing doth not duplicate the legacy; otherwise, if it be in two such distinct writings as aforesaid."

Under the early view no revocatory effect is necessarily assigned to the residuary clause in the later instrument. The former gifts either repeated, altered or omitted in the later will might still be subtracted before claims should be asserted under the residuary clause.<sup>94</sup> Yet almost without exception the presence of a residuary clause in the later will has been given the exact force of a revocatory clause. The courts say that the later will suffices to dispose of all the property and so is wholly inconsistent with the earlier will.<sup>95</sup>

<sup>93</sup> *Supra*, n. 21.

<sup>94</sup> *Adams v. Maris*, 213 S. W. 622 (1919) Tex. Com. App. (A holographic will gave certain notes to A and B. A later will gave a legacy to C and "all the rest to my bodily heirs." Held the residuary legatees should not prevail over A and B.

<sup>95</sup> *In re Danford's Estate*, 196 Cal. 339, 238 P. 76 (1925) (Earlier will without residuary clause, provided two general legacies and divided the residue between A and B. A codicil provided legacy for C. The later will revoked expressly the gift to C, gave legacies to D and E and gave the residue to X. It is submitted that the express revocation of the gift to C and the implied revocation of the gift of the residue to A and B, should leave the two general legacies untouched); *Lasier v. Wright*, 304 Ill. 130, 136 N. E. 545 (1922); *Neibling v. Methodist Ass'n*, 315 Mo. 578, 286 S. W. 58 (1926), 51 A. L. R. 639 (The later will repeated some, altered some and omitted some of the earlier provisions. The same executor was named in each will, but the residuary beneficiaries in the later will were different persons. The first will was preserved and the testator intended both to stand. Held revoked. The will is so free from doubt that parol evidence of intent cannot be admitted); *Simmons v. Simmons*, 26 Barb. 68 (N. Y. 1857); *In re Gilman*, *supra*, n. 30 (The great change in circumstances and the significant variations in the second will seem sufficient to warrant a revocation entirely apart from the residuary clause); *Daugherty v. Holscheider*, 88 S. W. 1113 (Tex. Civ. App. 1905); *Re Fisher*, 4 Wis. 254 (1854) (Each will contained a residuary clause, one residuary beneficiary being added to those named in the first will. The other legacies were varied in form and amount. The court evidently concludes that there was no intent of cumulation and says that there cannot be two wills when each purports to be complete and distinguishes *Holley v. Hatton*, Dickens 461 (Ch. 1784) where there was no residuary clause, and the second instrument was a codicil.

As to cumulation, where there is no residuary clause, it is to be noted that Godolphin says it does not occur (a) where the testator intends a substitution and (b) it occurs if at all only where there are two different writings "as in a testament or a codicil." Whether a substitution or a cumulation is intended is not a matter of integration primarily but rather one of construction, but the probate court has followed the practice of treating the matter as involving the process of integration. Again Godolphin's illustration of the second writing is a codicil rather than a will. It may be assumed as the settled rule that there is no cumulation where the later will contains a residuary clause and that such a clause is the substantial equivalent of a revocatory clause.

*Executors Named in Earlier Will but Not Named in the Later Inconsistent Will.* It is sometimes declared that if the dispositions of the later will are entirely inconsistent with those of the earlier will, such earlier will is wholly revoked, though it contains an appointment of executors and the later one does not.<sup>96</sup>

The leading authority in England is *Henfrey v. Henfrey*.<sup>97</sup> The later will declared, "all I possess in this world I give to my wife."<sup>98</sup> A gift of "all I possess" has the effect both of a specific and a residuary bequest. But it operates on the property only. This case held that though the prior will named executors and the later one did not, still the earlier will could not be probated even to the extent of the nomination of executors. The reason assigned by Sir Herbert Jenner-Fust was that the naming of executors was an appointment of property, and since the property was all given to the wife, the nomination failed. This reason is purely historical and does not now prevail, either in England or here where personal representatives receive compensation or fees. If we are to assume that all wills not clearly contradictory are to be construed together because that is the presumed intent of the testator, is there any present reason to

<sup>96</sup> 51 A. L. R. 681 (1927) 1 Jarman on Wills (7th ed. 1930) 162; 1 Williams on Executors (2d ed. 1930) 103. But in *Deppen v. Deppen*, 132 Ky. 755, 117 S. W. 352 (1909) the later will (codicil) revoked the earlier dispositive provisions but named no executor and the earlier appointment was not revoked.

<sup>97</sup> 2 Curt. 468 (Ecc. 1842).

<sup>98</sup> *Dempsey v. Lawson*, *supra*, n. 31.

follow the *Henfrey* case?<sup>99</sup> There is some English authority the other way.<sup>100</sup> But the leading American case is *Re Iburg*,<sup>101</sup> which holds squarely on the point that if the entire property is disposed of by an inconsistent second will, the appointment of executors in the first will is revoked also, though no reference is made to the appointment. It cites the *Henfrey* case and two American cases in point.<sup>102</sup>

It is submitted that there is no occasion longer to follow such a rule. There is no appropriate distinction between the disposition of property and the naming of executors in respect to revocation, and a testamentary provision should not be revoked unless the inference of revocation is a necessary one. The argument sometimes made that a complete inconsistency in the dispositions made is equivalent to an express revocation of the appointment, or that the duties of an executor are confined to the will by which he is appointed, is simply assertion.<sup>103</sup> A revocatory clause applies to the dispositions and to the appointment, but inconsistency in dispositions applies only to the property. So if the argument that the duties of an executor are limited by the will naming him is sound, should we not also hold that a codicil making entirely different dispositions from those in the will should also revoke the appointment, though it does not name executors? Yet that is not the rule.

*The Evidence to Establish Revocation Appearing in a Lost Will.* Two interesting situations have arisen: (a) Suppose a lost but unrevoked will cannot be established with respect to its dispositive provisions because of the statutory requirement of two witnesses. May its revocatory effect arising either from its inconsistency with an earlier, existing will, or from the presence of a revocatory clause, be established by evidence sufficient at

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<sup>99</sup> Note that the later English cases cited in support of it are distinguishable except *Goods of Turnour*, 56 L. T. 344 (1886), e. g., *Gottrell v. Gottrell*, L. R. 2 P. & D. 397 (1872) contained a revoking clause. *Goods of McFarlane*, 13 L. R. Ir. 264 (1884) (No appointment in either will); *O'Leary v. Douglass*, 3 L. R. Ir. 323 (1878) (Wills were exact duplicates); *Pepper v. Pepper*, 1 R. 5 Eq. 85 (1870) (Same persons named executors in both wills).

<sup>100</sup> *Goods of Griffith*, L. R. 2 P. & D. 457 (The two wills were probated by consent of the parties); *Goods of Leese*, 2 S. W. & Ir. 442 (Eccl. 1862).

<sup>101</sup> *Supra*, n. 39.

<sup>102</sup> *Henfrey v. Henfrey*, *supra*, n. 97.

<sup>103</sup> *Kearns v. Roush*, *supra*, n. 39; *Gensimore's Estate*, 246 Pa. 216, 92 A. 134 (1914).

common law, so that it will defeat the earlier will? (b) Suppose a later lost will is presumptively revoked because it cannot be traced beyond the possession of the testator, or suppose the later will was revoked by testator's known destructive act during his life. Can proof of its inconsistency or of the presence of a revocatory clause be established by evidence sufficient at common law, though the statute requires the evidence of two witnesses to prove the contents of a lost unrevoked will? The policy underlying the statute is to prevent the establishment of a lost will by perjured evidence.<sup>104</sup> One would suppose that there is a similar policy in preventing a fraudulent revocation of the earlier will.<sup>105</sup> It seems unfortunate to establish different rules of evidence for cases so similar, yet that has in fact been done.<sup>106</sup> But a revocation in an unrevoked, lost will requires the same quantity of evidence as is required to establish the dispositive provisions.<sup>107</sup>

The revoking clause may be proved alone, however, even though evidence is lacking as to the dispositive provisions.<sup>108</sup> There is a conflict as to the way the evidence may be used. It is sometimes held that a mere revocation is not testamentary and should not be probated.<sup>109</sup> If the revocation is contained with-

<sup>104</sup> 7 Corn. L. Q. 69 (1922).

<sup>105</sup> Cal. Code of Civ. Proc. § 1338, now § 350 Cal. Probate Code (1931) (Statute applies to a lost or destroyed will proved to be in existence at death of testator or fraudulently destroyed, etc., during his lifetime without his knowledge, requires two witnesses. Hence, it does not necessarily apply to situation (b)).

<sup>106</sup> *Bassett's Estate*, 196 Cal. 576, 238 P. 666 (1925), Civil Code 1296-7, 1844 (For a revoked lost will a single witness is sufficient to show that it revoked a prior will by inconsistency therewith). *In re Johnson's Estate*, 188 Cal. 336, 206 P. 628 (1922) (Presence of revocatory clause proved by one witness). See accord. *Wear's Will*, 116 N. Y. S. 304 (App. D. 1909). In *Harris v. Harris*, 26 N. Y. 433 (1863), the contents of a will fraudulently destroyed during testator's lifetime could not be proved under the statute by one witness, but that was held to apply to probate and not to suits between claimants of property; Cahill's Consolidated Laws of New York (1930), Chap. 13, Sec. 204.

<sup>107</sup> *In re Thompson's Estate*, 185 Cal. 763, 198 P. 795; *Dingman v. Dingman*, 199 Mich. 384, 165 N. W. 712 (1917)—Same rule, though statute was passed after the execution of the will. See Compiled Laws of Michigan, sec. 15548 (1929).

<sup>108</sup> *In re Cunningham*, 38 Minn. 169, 36 N. W. 269 (1888) (Rule of dependent relative revocation held inapplicable); *Brackenridge v. Roberts*, 114 Tex. 418, 267 S. W. 244 (1924), 270 S. W. 1001 (1925) (revoking clause could be proved but none of the remainder of the later will).

<sup>109</sup> *Rudy v. Ulrich*, 69 Pa. St. 177 (1871).

in an existing will which is capable of presentation for probate, it is held that the revocation of the earlier will cannot be established without offering the entire will for probate.<sup>110</sup> But if the revocation lies in a lost will whose contents cannot be proved save that the revocation is provable or if the revocation lies in another writing not a will, such evidence is admissible to resist probate of an earlier will.<sup>111</sup>

*The Probate of a Mere Revocation.* The question often arises, how is the evidence of revocation by subsequent writing to be introduced, that is, must such revocatory instrument be probated in order to establish it with judicial effect, or may it be introduced as any other written evidence would be in the course of the hearing on the will?

There is probably no conflict in the authorities that a will may be revoked by a later will which is now lost, which contained a revocatory clause, without probate of such lost will or clause in it.<sup>112</sup> But the question arises, just what use is to be made of a properly executed revocation (other writing) which contains no disposition of property nor appointment of executors or guardian. Formerly in England, administration was granted with the revoking paper annexed.<sup>113</sup> The present English practice is that the revocatory paper is not probated, but it is introduced in evidence to defeat a will offered for probate, and for the purpose of obtaining letters of administration.<sup>114</sup>

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<sup>110</sup> *Wallis v. Wallis*, 114 Mass. 510 (1874); *Rudy v. Ulrich*, 69 Pa. St. 177 (1871) (another writing containing a revocation need not be probated, but if revocation is in a will it must be offered for probate or revocation fails); *Stickney v. Hammond*, 138 Mass. 116 (1884) (An appeal had been taken from the probate of the revoking will, which was not defended by the executor and devisees, and an order was entered disallowing probate for that reason. Thereafter, when the earlier will, containing similar provisions, was offered for probate, the widow offered to prove revocation by the later will. Held proof not admissible, since the entire will could not be proved); *Lyon v. Dada*, 127 Mich. 395, 86 N. W. 946 (1901). Denial of probate of later will is res adjudicata also as to the revocation.

<sup>111</sup> *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698 (1883) (Revocatory paper, even one capable of probate, may be used as evidence of revocation, though not offered for probate); *Day v. Day*, 2 Green 549 (N. J. Eq. 1831) (Revocation in a lost will may be used as evidence without probate). Cf. *Helyar v. Helyar*, 1 Cas. Temp. Lee 472 (1754).

<sup>112</sup> *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705 (1903).

<sup>113</sup> *Goods of Hubbard*, L. R. 1 P. & D. 53 (1865). See *Goods of Durance*, *supra*, n. 11, and *Re McNeil*, 45 N. B. 479, 42 D. L. R. 449 (1918), for form of order.

<sup>114</sup> *Toomer v. Sobinska*, *supra*, n. 11. See also for form of order, *Goods of Eyre* (1905) 2 I. R. 540 and 16 Halsbury's Laws of England,



It is not clear in some American states holding that such a writing may be probated whether or not probate is required.<sup>115</sup> In some it is clear, revocation may be established without probate,<sup>116</sup> while in others perhaps probate is required.<sup>117</sup> The practice seems to be that if the instrument is in form a will and not merely revocatory, its validity must be tried in a proceeding to probate it, but if it is lost and its contents are incapable of proof for purposes of probate, the presence of a revocatory clause in it may be established, for the purpose of showing a revocation, without probate.<sup>118</sup> If probate has been refused in a prior action for any reason, the decree is *res adjudicata* and no use can be made of it to show revocation of an earlier will.<sup>119</sup>

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That "this is my last will" is a mere form seems clear, though some revocatory weight is still given to the form in a few jurisdictions. Where a will contains a revocatory clause the earlier will is revoked. The only way around the result is to assume that the probate court has power to set the revocation aside, thus placing the earlier will in such position as it would have been if no revocation had ever been made. Where there is no revocatory clause a residuary clause usually has the same effect and is regarded as inconsistent with the giving of any

Executors and Administrators, 191. See also *Goods of Hicks*, L. R. 1 P. & D. 683 (1869) and *Re Fraser*, L. R. 2 P. & D. 40 (1870).

<sup>115</sup> *Grotts v. Cashburn*, 295 Ill. 286, 129 N. E. 137 (1920); *Pierce's Estate*, 63 Wash. 437, 115 P. 835 (1911).

<sup>116</sup> *Estate of Thompson*, *supra*, n. 107; *Stevens v. Hope*, *supra*, n. 111; *Rudy v. Ulrich*, *supra*, n. 110; *Nelson v. McGiffert*, 3 Barb. 158 (N. Y. Ch. 1848).

<sup>117</sup> *Newboles v. Newboles*, *supra*, n. 11. See 18 Mich. L. Rev. 814; 29 Yale L. Jour. 941; *Leard v. Askew*, 28 Okla. 300, 114 P. 251 (1911).

<sup>118</sup> *Wallis v. Wallis*, *supra*, n. 110 (The proposition in *Laughton v. Atkins*, *supra*, n. 63, that a will might not be provable because its attesters are all beneficiaries and therefore the revoking clause might be presented in evidence independently would scarcely be urged now).

<sup>119</sup> In *Stickney v. Hammond*, *supra*, n. 110, there were two wills each containing a revocatory clause, and they were exactly alike save that the latter exempted the executor from the obligation of furnishing sureties. The latter one was probated and an appeal from probate was taken by the heirs. The executors and devisees declined to defend against the appeal and an order was entered sustaining the appeal, thus reversing the probate decree. When the prior will was offered for probate, the later will was offered in evidence to show revocation of it. This evidence was rejected and the former decree was held to be *res adjudicata* since the clause cannot be used in evidence without probate of it. See accord. *Lyon v. Dada*, *supra*, n. 110.

effect to an earlier will. Thus, there is no opportunity for cumulation, or payment of omitted bequests.

If the later will merely repeats the earlier one, it does not revoke the latter. If it repeats some of the earlier provisions, omits some, alters some, and inserts others, it cannot be fairly said that those repeated are necessarily inconsistent and so revoked, nor that the altered ones are other than partly revoked, nor that even the omitted ones are revoked without more, though it must be said that a specific legacy first given to A and later given to B is revoked by inconsistency. So if the repeated gift is inoperative, wholly or in part, the earlier one continues operative to the extent that there is no conflict.

As to the repeated provisions, the earlier will is inoperative rather than revoked if there is no cumulation. The probate court is required in such a case to perform the functions of integrating the testamentary papers and construing them. If the two wills are *wholly* alike and cumulation is not intended, there is no occasion to probate the earlier one, though it is in fact immaterial whether or not probate of it is granted, save that it may give a construction court an opportunity to pass upon the issue of cumulation. If they are partly alike but the provisions are not cumulative, again there is no occasion to probate the earlier one as to that repeated part and if probated, that part would still be inoperative. The rule seems to be well settled that if a later will is consistent with the earlier one only in that it names no executors, the earlier appointment is revoked, though there be no revocatory clause. There is generally no occasion to probate an instrument which is a mere revocation, providing it may be used in evidence at the time of the probate proceeding. In some states an inconsistent will may be used the same way without probate.